

## DEPARTMENT OF EDUCATION

### Office for Civil Rights; Single-Sex Classes and Schools: Guidelines on Title IX Requirements

**AGENCY:** Department of Education.

**ACTION:** Guidelines on current title IX requirements related to single-sex classes and schools.

**SUMMARY:** On January 8, 2002, the President signed into law the No Child Left Behind Act of 2001, which reauthorized the Elementary and Secondary Act of 1965. Section 5131(a)(23) of the Elementary and Secondary Education Act allows local educational agencies (LEAs) to use Innovative Programs funds to support same-gender schools and classrooms consistent with applicable law. It also requires the Department, within 120 days of enactment, to issue guidelines for LEAs regarding the applicable law on single-sex classes and schools. This notice fully implements Congress's mandate by describing and explaining the current statutory and regulatory requirements relating to single-sex classes and schools.

#### FOR FURTHER INFORMATION CONTACT:

Jeanette J. Lim, Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036, Mary E. Switzer Building, Washington, DC 20202-2899. Telephone: (202) 205-8635 or 1-800-421-3481.

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**SUPPLEMENTARY INFORMATION:** This notice implements Congress's mandate in the No Child Left Behind Act of 2001 (NCLB Act) to provide guidelines to LEAs regarding the applicable law on single-sex classes and schools. See Pub. L. 107-110, Sec. 5131(a)(23), 5131(c).

Elsewhere in this issue of the **Federal Register** is a notice of intent to regulate (NOIR), which invites comment on our intention to amend the current regulations implementing Title IX of the Education Amendments of 1972 (Title IX) related to elementary and secondary single-sex classes and schools to

provide more flexibility to educators. The purpose of these amendments would be to support efforts of school districts to improve educational outcomes for children and to provide public school parents with a diverse array of educational options that respond to the educational needs of their children, while at the same time ensuring appropriate safeguards against discrimination. The NOIR is intended to begin this process and ensure adequate public input on these important and sensitive issues.

#### Guidelines on Current Title IX Requirements

*Single-sex classes:* The Title IX statute generally prohibits sex-based discrimination in education programs or activities receiving Federal financial assistance. Specifically, it states that no person in the United States, on the basis of sex, can be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681.

Section 1681(a) of Title IX contains two limited exceptions relating to classes or activities within primary and secondary schools that otherwise are coeducational. Subsection 1681(a)(7)(B) of Title IX exempts any program or activity of any secondary school or educational institution specifically intended for the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference or for the selection of students to attend such a conference. Subsection 1681(a)(8) of Title IX states that the law does not preclude father-son or mother-daughter activities at an educational institution. However, if those activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex. Accordingly, these activities are permitted on a single-sex basis if the requirements of the statute are met.<sup>1</sup>

Our current Title IX regulations generally prohibit single-sex classes or activities. The regulations in 34 CFR 106.34 state—

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical,

<sup>1</sup> The statute also exempts activities of educational institutions controlled by religious organizations to the extent that the application of Title IX would be inconsistent with the religious tenets of the organizations 20 U.S.C. 1681(a)(3).

home economics, music, and adult education courses.

Our regulations contain two categorical exceptions for specific types of classes or portions of classes that may be segregated by sex. Those exceptions are: (1) Physical education classes during participation in sports "the purpose or major activity of which involves bodily contact" (34 CFR 106.34(c)); and (2) "[p]ortions of classes in elementary and secondary schools which deal exclusively with human sexuality." (34 CFR 106.34(e)). In addition separation of students by sex is permitted if it constitutes remedial or affirmative action. 34 CFR 106.3.<sup>2</sup>

*Single-sex schools:* The Title IX statute exempts from its coverage the admissions practices of non-vocational elementary and secondary schools.<sup>3</sup>

Accordingly, the regulations do not prohibit recipients from adopting single-sex admissions policies in non-vocational elementary and secondary schools. See 34 CFR 106.15(d). However, the regulations specifically provide that an LEA may "exclude any person from admission" to a non-vocational elementary or secondary school "on the basis of sex" only if "such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." (34 CFR 106.35(b))<sup>4</sup> In other words, under the current regulations, an LEA cannot use a single-sex admissions policy—which is not itself subject to Title IX's prohibition—as the predicate for otherwise causing students, on the basis of sex, to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. For example, school districts may not establish a single-sex school for one sex that provides the district's only performing arts curriculum. Students of

<sup>2</sup> The current regulations also permit recipients to group students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex (34 CFR 106.34(b)) and to "make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex." (34 CFR 106.34(f)).

<sup>3</sup> Section 1681(a)(1) of Title IX states that in regard to admissions to educational institutions, the law applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. As such, non-vocational elementary and secondary schools are exempt.

<sup>4</sup> These provisions on single-sex schools do not apply to private elementary and secondary schools.

the other sex also must have access to a comparable school with that curriculum. It has been our longstanding interpretation, policy, and practice to require that the “comparable school” must also be single-sex.

An LEA may offer a single single-sex school if such an action constitutes remedial or affirmative action. (34 CFR 106.3) In addition, while the statutory exemption precludes the Department from examining an LEA’s justification for a single-sex school, LEAs also should be aware of constitutional requirements in this area.<sup>5</sup> LEAs may be

challenged in court litigation on constitutional grounds.

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Dated: May 3, 2002.

**Rod Paige,**

*Secretary of Education.*

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<sup>5</sup> The Supreme Court has decided two significant constitutional cases specifically regarding single-sex education. *United States v. Virginia*, 518 U.S.

515 (1996) (State-sponsored, male-only military college violated Equal Protection Clause); *Mississippi University for Women v. Hogan*, 458 US 718 (1982) (State-sponsored, female-only nursing school violated the Equal Protection Clause.)